ATTACHMENT 42

Decision No. C98-267

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 96S-331T

RE: THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY U S WEST COMMUNICATIONS, INC. WITH ADVICE LETTER NO. 2617, REGARDING TARIFFS FOR INTERCONNECTION, LOCAL TERMINATION, UNBUNDLING AND RESALE OF SERVICES.

DECISION REGARDING COMMISSION AUTHORITY TO REQUIRE COMBINATION OF NETWORK ELEMENTS

Mailed Date: March 13, 1998
Adopted Date: February 18, 1998

I. BY THE COMMISSION

A. Statement

1. In prior orders in this suspension docket,[1] we had ordered U S WEST Communications, Inc. ("USWC" or "Company"), to combine network elements for competing local exchange carriers ("CLECs") ordering service in this manner. In response to the court's decision in *Iowa Utilities Board v. F.C.C.*, 120 F. 3d 753

[1] As indicated in the caption, this case concerns U S WEST Communications, Inc.'s proposed permanent tariffs for the provision of certain services (*i.e.*, interconnection, local termination, unbundling, and resale) to competing local exchange carriers. Generally, this proceeding concerns obligations imposed upon the Company by the Telecommunications Act of 1996 and §§ 40-15-501 *et seq.*, C.R.S.

(8th Cir. 1997),[2] however, we rescinded that requirement, but ordered USWC to file additional proposed tariffs in this proceeding indicating how it intended to make unbundled network elements available to CLECs. USWC made that filing as directed. As part of their response to the Company's proposals, AT&T Communications of the Mountain States, Inc. ("AT&T"), and Sprint Communications Company L.P. ("Sprint") suggested that, notwithstanding the Eighth Circuit Court's ruling, the Commission possesses authority under State law to order USWC to combine network elements for CLECs. In Decision No. C98-47 (Mailed Date of January 20, 1998), we set the Company's new proposed tariffs for hearing and directed that interested parties file briefs addressing the Commission's authority under State law to order USWC, as part of its interconnection and unbundling obligations, to combine network elements for competitors.

2. USWC filed a brief on this issue. In addition, AT&T, Sprint, MCImetro Access Transmission Services, Inc., Teleport Communications Group, Inc., and WorldCom, Inc. (collectively "the CLECs"), filed their Joint Brief in this matter. As expected, USWC contends that the Commission does not possess authority to order the Company to combine network elements for CLECs; the CLECs suggest that we do. Now being duly advised in the premises, we determine that the Commission is empowered under

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[2] In *Iowa Utilities Board*, the Court ruled that, under the Telecommunications Act of 1996, the Federal Communications Commission lacked authority to order incumbent local exchange carriers to combine network elements for CLECs.

State law to require USWC to combine network elements for competitors as part of its obligations as an incumbent local exchange carrier ("ILEC").[3]

B. Discussion

1. Federal Preemption of State Law

a. The primary contention of USWC is that the Telecommunications Act of 1996 ("Act"),[4] as interpreted in *Iowa Utilities Board*, prohibits the Commission from requiring it to combine network elements for competitors. In *Iowa Utilities Board* the court vacated a Federal Communications Commission ("FCC") rule which imposed upon incumbents a duty to combine network elements for CLECs, based upon the provisions of 47 U.S.C. § 251(c)(3). That statute, in part, imposes upon ILECs such as USWC the duty:

> [T]o provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner *that allows requesting carriers to combine such elements in order to provide such telecommunications service.*

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[3] The propriety of such a requirement is, as explained *infra*, dependent upon factual determinations to be made based upon the hearing on USWC's new proposals. Accordingly, we do not decide here whether the Company will be required to combine network elements for CLECs.

[4] Pub. L. No. 104-104, 110 Stat. 56 (codified at various sections of Title 47, United States Code).

(Emphasis added.) The Eighth Circuit interpreted § 251(c)(3), particularly the last sentence, as precluding the FCC from levying a duty on ILECs to do the actual combining of elements for competitors. *See Iowa Utilities Board*, page 813.

b. USWC, in reliance upon this ruling, argues that the Act "forbids" a State requirement that ILECs combine network elements for competitors. According to the Company, such a requirement would contravene the Act's intent to implement competition in the local exchange market through the alternative mechanisms of unbundling of network elements and resale. In USWC's view, a requirement that it combine network elements for CLECs would, as found by the Eighth Circuit with respect to the FCC rule, "obliterate" the distinction between resale and access to network elements. Such a rule, the Company contends, is preempted by the Act.

c. Recognizing that the Act preserved State authority to prescribe access and interconnection obligations for local exchange carriers (*see* discussion *infra*) USWC contends that any such State requirement must be consistent with the Act, especially as interpreted by the Eighth Circuit. The Act, according to the Company, prohibits any requirement that incumbents combine network elements for competitors. Therefore, a Commission decision mandating that USWC combine network elements for CLECs would be "in direct conflict with the Act as construed by the Eighth Circuit." USWC Brief, page 2.

d. We disagree with these arguments. In the first place, to put the Eighth Circuit Court's decision in context, we note that the proceeding before the Court concerned the validity of *FCC* rules and the nature of *FCC* authority under the Act. To the extent the Court generally commented upon State authority to establish access and interconnection obligations under the Act--this issue arose in the course of the Court's invalidation of the FCC's attempts to preempt State policies (*Iowa Utilities Board*, pages 806-07)--the Court observed that the States retain independent power to adopt access and interconnection requirements. *See* discussion below.

e. As stated above, USWC argues that any State requirement that incumbents combine network elements for competitors is preempted by the Act, particularly the provisions of § 251(c)(3). State law is preempted if that law actually conflicts with Federal law, or if Federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, at 2617. In this instance (*i.e.*, on the question as to whether the Commission is empowered to order USWC to combine network elements for competitors), we agree with the CLECs that the Act is not intended to preempt State law.

f. Notably, § 251(d)(3) expressly provides:

> (3) Preservation of State access regulations--In prescribing and enforcing regulations to implement the

> requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Further, §§ 261(b-c) of the Act state:

> (b) Existing State regulations--Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.
>
> (c) Additional State requirements--Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

These provisions make clear that Congress, in the Act, did not intend to preempt State adoption and enforcement of access and interconnection requirements to apply to ILECs such as USWC.

g. According to the above provisions, State-imposed access or interconnection policies need only be "consistent with" the Act. In this case, USWC contends that a State requirement that it combine network elements would be inconsistent with the Act as interpreted by the Eighth Circuit. We disagree. The Court itself, in interpreting § 251(d)(3),

observed that, "It is entirely possible for a state interconnection or access regulation, order or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II." *Iowa Utilities Board*, at 806. This observation is in keeping with our conclusion that the term "consistent with" does not require that States implement *the identical* regulatory policies as will prevail at the Federal level. *See Environmental Defense Fund, Inc. v. E.P.A.*, 82 F.3d 451 (D.C. Cir. 1996) ("consistent with" does not require exact correspondence, but only congruity or compatibility); *Roanoke Memorial Hospitals v. Kenley*, 352 S.E.2d 525 (Va. App. 1987) ("consistent with" does not mean exactly alike, but instead means "in harmony with" "holding to the same principles" or "in general agreement with").

h. The premise of USWC's argument that the Commission may not adopt a policy requiring incumbents to combine network elements for CLECs is that the Act, as interpreted by the Eighth Circuit, absolutely prohibits ILECs from doing the combining of elements for competitors. This premise is not supported by the Act or the Court's decision. For example, the Court did not hold that incumbents may not voluntarily agree to combine network elements for CLECs; nor did the Court hold that the combining of network elements by an incumbent would be unlawful. The Court's ruling with respect to this issue was

simply that the FCC could not compel ILECs to combine network elements for CLECs under the Act. We note that requiring USWC to do the combining of elements (assuming such a policy is permitted under State law) may very well be consistent with the intent of the Act to promote competition. *See Iowa Utilities Board*, page 816 (one purpose of the Act is to expedite the introduction of pervasive competition into the local exchange market). In this event, a State requirement that the Company combine network elements for CLECs would be consistent with the Act. Therefore, we determine that Federal law does not preempt a Commission requirement that USWC combine network elements for competitors.

2. Commission Authority Under State Law

a. Having decided that Federal law does not preempt a State policy regarding the combination of network elements, we must determine whether the Commission, in fact, possesses authority under Colorado law to adopt such a policy. USWC suggests that State law does not permit the Commission to require incumbents to combine network elements for competitors. The CLECs contend that a number of provisions under Colorado law grant the Commission authority to adopt such a requirement.

b. We find that State law provides the Commission broad authority to review network use and interconnection in the competitive market. The Joint Brief correctly points out that the Commission possesses comprehensive authority to regulate the rates, terms, and conditions of services provided by ILECs such as USWC. For example, § 40-3-102, C.R.S., provides:

> The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in said articles through proper courts having jurisdiction. . . .

c. We point out that the present case is an investigation and suspension docket conducted by the Commission pursuant to the provisions of § 40-6-111, C.R.S.[5] That statute states that whenever the Commission conducts a hearing under its

[5] In § 40-15-503(2)(g)(II), C.R.S., the Legislature directed the Commission to conduct proceedings, under § 40-6-111, C.R.S., for each telecommunications carrier that will provide unbundled facilities or functions, interconnection, services for resale, or local number portability.

provisions, ". . . the commission shall establish the rates, fares, tolls, rentals, charges, classifications, contracts, practices, rules, or regulations . . . which it finds just and reasonable." *Accord* § 40-3-111, C.R.S. (the Commission, after hearing, may determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be observed by any public utility); § 40-4-101, C.R.S. (Commission shall prescribe rules and regulations for the performance of any service furnished or supplied by any public utility). Finally, we conclude that, to the extent we determine it is necessary for USWC to combine network elements for competitors in order to promote competition in the local exchange market, such a directive to the Company would be consistent with the Legislative intent set forth in § 40-15-101, *et seq.*, C.R.S.

d. For these reasons, we conclude that State law empowers us to order USWC to combine network elements for CLECs if appropriate. Whether such an order is proper depends upon the factual investigation presently being conducted in this case. For example, the CLECs in their Joint Brief contend that the Company's proposed method of giving access to network elements to competitors (*i.e.*, the SPOT frame proposal) is discriminatory, unjust, and unreasonable. This suggestion constitutes a factual assertion which must be considered in light of the evidentiary hearing. We will issue further orders on this question in light of the evidence presented at hearing.

II. ORDER

A. The Commission Orders That:

1. We determine that the Telecommunications Act of 1996 does not preempt Commission authority under State law to order U S WEST Communications, Inc., to combine network elements for competing local exchange carriers.

2. We further determine that the Commission is empowered under State law to order U S WEST Communications, Inc., in this docket, to combine network elements for competing local exchange carriers, if we determine that such a requirement is necessary and appropriate.

3. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING February 18, 1998.

(SEAL)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT J. HIX

R. BRENT ALDERFER

Commissioners

COMMISSIONER VINCENT MAJKOWSKI
ABSENT

ATTEST: A TRUE COPY

Bruce N. Smith
Director

ATTACHMENT 43

112 State Street
Drawer 20
Montpelier, VT 05620-2701
Tel.: (802) 828-2358

TTY/TDD (VT): 1-800-734-8390
Fax: (802) 828-3351
E-Mail: clerk@psb.state.vt.us
Internet: http://www.state.vt.us/psb

State of Vermont
Public Service Board

May 12, 1998

TO PARTIES IN PSB DOCKET NO. 5713

RE: Proposal for Decision Regarding Federal Preemption

Dear Parties:

Pursuant to 30 V.S.A. Section 8 and 3 V.S.A. Section 811, I am enclosing my Proposal for Decision concerning Federal Preemption with regard to Phase II, Module Two, of the above docket.

If you have any comments, please file them on or before May 22, 1998. Any comments will then be submitted to the Public Service Board along with the Proposal for Decision for final determination. If you wish, you may request oral argument before the Board.

It should be emphasized that the enclosed Proposal is not a final decision of the Board and may be subject to modification by the Board.

Very truly yours,

Frederick Weston
Hearing Officer

Enclosure

cc: Susan M. Hudson, Clerk of the Board

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5713

Investigation into New England Telephone)
and Telegraph Company's (NET's) tariff filing)
re: Open Network Architecture, including)
the unbundling of NET's network, expanded)
interconnection, and intelligent networks)
in re: Phase II, Module Two)

Order entered:

PRESENT: Frederick W. Weston, III
Hearing Officer

APPEARANCES: Sheldon Katz, Esq.
for the Vermont Department of Public Service

Thomas M. Dailey, Esq.
for New England Telephone & Telegraph Company
d/b/a Bell Atlantic-Vermont

John H. Marshall, Esq.
Downs, Rachlin & Martin
for Atlantic Cellular Company, L.P. d/b/a Cellular One
and Hyperion Telecommunications of Vermont, Inc.

William B. Piper, Esq.
Paul J. Phillips, Esq.
Primmer and Piper, P.C.
for Champlain Valley Telecom, Inc.
Franklin Telephone Company
Ludlow Telephone Company
Northfield Telephone Company
Perkinsville Telephone Company
Shoreham Telephone Company, Inc.

STE/NE Acquisition Corp.
d/b/a Northland Telephone Company of Vermont, Inc.
Topsham Telephone Company, Inc.
Waitsfield-Fayston Telephone Company, Inc.
d/b/a Waitsfield Telecom

Melinda B. Thaler, Esq.
for AT&T Communications of New England, Inc.

Robert Glass, Esq.
Glass, Seigle and Liston
for MCI Telecommunications Corporation

Stephen Whitaker, *pro se*
for Design Access Network

Evelyn Bailey, Executive Director
for the Enhanced 911 Board

PHASE II ORDER RE: FEDERAL PREEMPTION OF STATES' AUTHORITY TO REQUIRE THE RECOMBINATION OF UNBUNDLED NETWORK ELEMENTS

I. INTRODUCTION

This proposed order concludes that the federal Telecommunications Act of 1996 ("Act"[1]) does not preempt state power to order local exchange companies ("LECs") to provide unbundled network elements ("UNEs"), on a recombined basis, to competitive LECs ("CLECs") and other telecommunications providers who request them. This order also concludes that the Public Service Board has sufficient authority under current state law to direct incumbent LECs to recombine UNEs for CLECs, if the Board concludes that such recombination is appropriate – which is to say, will promote efficient competition in the Vermont local exchange market, thus assuring consumers adequate service at just and reasonable rates.

A. Procedural Background and Scope of this Order

During a status conference (by telephone) on December 23, 1997, the New England Telephone & Telegraph Company (d/b/a Bell Atlantic-Vermont, "BAVT" or "Company"),[2] AT&T Communications of New England, Inc. ("AT&T"), and the Department of Public Service ("Department" or "DPS") asked the Board to determine whether it has authority unde Vermont law to regulate the manner in which incumbent LECs provide UNEs to CLECs and other telecommunications providers. They agreed that the Board could take up this jurisdictional question without holding evidentiary hearings, relying instead upon pleadings tha they would file. A schedule for the submission of those pleadings and additional relevant documentation was set.[3]

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1. The Act amends, and adds to, many sections of Title 47 of the United States Code (47 U.S.C.).

2. BAVT is a division of the Bell Atlantic Corporation, which operates in thirteen eastern states and the District of Columbia. In this Order, "Bell Atlantic" refers to the corporation in its entirety; when it is followed by a hyphen and a state's name, it refers to the company's division operating in that state.

3. BAVT Letter 12/23/97 at 1-2; AT&T Letter 1/9/98 at 3. The parties agreed to adopt part of the record from a Massachusetts Department of Telecommunications and Energy proceeding, specifically, Dockets DPU 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Hearing Volume No. 25, December 16, 1997, which includes the testimony and relevant exhibits of Bell Atlantic witness Amy Stern and AT&T witness Robert Falcone.

The parties further agreed that, if the Board finds that it does have such authority, then it may later, in this or another proceeding, take up any remaining technical issues that UNE provision – in particular, recombination – raises.[4] However, later in its written submission, the DPS argues that a second phase in which the Board would develop a policy on UNE recombination is unnecessary and that the Board could, on the basis of the filings, reach a final determination on whether UNE recombination should be required if requested by a CLEC.[5] I disagree. The parties consented to brief and discuss only the narrow questions of federal preemption and state authority. A subsequent inquiry into whether and, if so, how incumbents should be required to combine, or refrain from disassembling, UNEs will likely necessitate an evidentiary record, and I therefore leave it for another time.

B. Positions of the Parties

AT&T alleges that, upon the issuance of the Eighth Circuit's Rehearing Order in a proceeding concerning the validity of rules issued by the Federal Communications Commission ("FCC") to implement provisions of the Act,[6] Bell Atlantic-Massachusetts made the decision to "rescind prior commitments and representations as to its willingness to provide unbundled network element combinations."[7] AT&T asserts that Bell Atlantic's proposed changes to UNE provisioning in that state have implications for its UNE provisioning in Vermont. According to AT&T, such a UNE provisioning policy would be unnecessary, costly, and detrimental to service quality.[8] AT&T asks that the Board order BAVT to refrain from disassembling "existing combinations of unbundled network elements, and more generally require Bell

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4. AT&T Letter 1/9/98 at 1-3.

5. DPS Memorandum of Opposition to Bell Atlantic's Network Dismantlement Proposal 1/23/98 ("DPS 1/23/98") at 3.

6. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *Iowa Utilities Bd. v. FCC*, No. 96-3321 et al., 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997)("Rehearing Order" or "Eighth Circuit Decision"). The relevance of this decision to today's proposed order is described in the following sections.

7. Memorandum of AT&T Communications of New England, Inc. 1/23/98 ("AT&T 1/23/98") at 4.

8. "The real issue," according to AT&T, "is not whether Bell Atlantic can be required to 'assist' CLECs by combining UNEs, but rather whether Bell Atlantic can be prohibited from affirmatively harming competitors and competition by doing needless, costly, and destructive disassembly of network elements that have already been physically combined." AT&T 1/23/98 at 11.

Atlantic to provide unbundled network combinations to competing local exchange carriers."[9] The DPS joins in AT&T's request.[10] In response, BAVT argues that, even if state law would permit the Board to consider a requirement for BAVT to provide combined UNEs, such authority has been preempted by the Act.[11]

II. FEDERAL PREEMPTION OF STATE LAW

In the Rehearing Order, the Eighth Circuit concluded that § 251(c)(3) of the Act does not require incumbent LECs such as BAVT to combine UNEs for CLECs, and the Court therefore vacated an FCC rule mandating such "recombination." Among other things, this section of the Act imposes upon incumbents the duty:

> [T]o provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.[12]

The Eighth Circuit concluded that the second (and final) sentence of this section "unambiguously indicates that requesting carriers will combine the unbundled elements themselves," and that "this language cannot be read to levy a duty on the incumbent LECs to do the actual combining of elements."[13]

BAVT argues that the Board has no authority to "lawfully compel BAVT to provide 'combined' network elements to other telecommunications carriers."[14] It contends that § 251(c)(3) of the Act requires an incumbent LEC to provide access to the elements of its

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9. *Id.* at 10. AT&T asserts that, if the Board agrees with AT&T as to the extent of the Board's ability under Vermont law to mandate UNE provisioning according to AT&T's view, then in the subsequent phase to this proceeding, AT&T will argue that the Board should order BAVT to provide unbundled network combinations in order to further the Board's pro-competition goals. *Id.*
10. DPS 1/23/98 at 3 n.2.
11. Memorandum of Law of Bell Atlantic-Vermont 1/23/98 ("BAVT 1/23/98") at 1.
12. Act, § 251(c)(3).
13. Rehearing Order at 813.
14. BAVT 1/23/98 at 11.

network only on an unbundled (as opposed to a combined) basis. In other words, argues BAVT, § 251(c)(3) does not permit a new entrant to purchase assembled platforms of combined network elements (or a lesser combination of elements) in order to offer competitive telecommunications services.[15] According to BAVT, to permit this and to require access to already-combined network elements at cost-based rates for unbundled access would destroy the careful distinctions which Congress established in §§ 252(c)(3) and (4) between unbundled elements on the one hand and the purchase, for resale purposes, of an incumbent's entire retail services on the other hand.[16]

BAVT also argues that the Eighth Circuit vacated the FCC requirement that incumbent LECs offer combined network elements to other providers "not because the authority to impose that requirement was reserved to the States, but rather because [the rules] could not be 'squared with,' and were 'contrary to,' the Telecommunications Act of 1996."[17] Under the Supremacy Clause of the U.S. Constitution and the doctrine of preemption, argues BAVT, the Eighth Circuit's interpretation of the Act is equally applicable to the States. Consequently, asserts BAVT, the Board cannot impose a like condition upon the Company in Vermont.[18]

I do not agree. The Board is not preempted by the Act from taking action in this respect. The Eighth Circuit's decision went to the validity of FCC rules and the nature of FCC authority under the Act. To the extent that the Court considered State authority at all, it observed that States retain independent power to develop interconnection and access requirements.[19] The Act recognizes that role of the States; § 251(d)(3) expressly provides:

> (3) PRESERVATION OF STATE ACCESS REGULATIONS – In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order or policy of a State commission that –
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) *is consistent* with the requirements of this section; and

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15. Hence the term, UNE-P, or "unbundled network element platform."
16. BAVT 1/23/98 at 2, 7-9.
17. *Id.* at 1-2.
18. *Id.*
19. Rehearing Order at 806.

> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[20]

In addition, §§ 261(b)-(c) of the Act state:

> (b) EXISTING STATE REGULATIONS – Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are *not inconsistent with* the provisions of this part.
>
> (c) ADDITIONAL STATE REQUIREMENTS – Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are *not inconsistent with* this part or the Commission regulations to implement this part.[21]

These sections establish Congressional intent not to preempt access and interconnection requirements adopted and enforced by States, unless the state requirements are inconsistent with the Act.

The Supremacy Clause (Art. VI, cl. 2) of the United States Constitution provides the federal government with the power to preempt state law.[22] To determine whether a state statute or regulation is preempted by federal law, the fundamental inquiry is whether Congress intended to preempt the state.[23] This inquiry "... starts with the basic assumption that Congress did not intend to displace state law."[24] This presumption against preemption is especially strong when Congress has legislated in an area historically subject to regulation by the states: "we 'start with the assumption that the historic police powers of the States were not

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20. Emphasis added.

21. Emphasis added.

22. Assuming, of course, that Congress is acting within the scope of its legitimate authority. No party in the current proceeding has suggested that regulation of telephone rates is outside the scope of Congressional authority.

23. *E.g., Medtronic, Inc. v. Lohr*, 64 U.S.L.W. 4625, 4629 (1996); *Schneidewind v. ANR Pipeline Co. and ANR Storage Co.*, 108 S.Ct. 1145, 1150 (1988).

24. *Maryland v Louisiana*, 451 U.S. 725, 746 (1981); *see also Medtronic*, 64 U.S.L.W. at 4629; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25 at 479-480 (2d ed. 1988).

to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[25]

Courts customarily treat preemption as falling into one of three general categories – express preemption, implied preemption, and conflict preemption – although, as Professor Tribe notes, the categories "are anything but analytically air-tight."[26] The first category, express preemption, exists when Congress expressly states its intention to preclude state action.[27] Implied preemption is found when the structure or objectives of federal law demonstrate that Congress intended to preclude state law.[28] Conflict preemption results when state law actually conflicts with federal law, either due to the physical impossibility of complying with both laws or to a state regulation obstructing the accomplishment of the full objectives of Congress.[29]

In recent decisions, the United States Supreme Court has somewhat truncated this traditional three-part preemption analysis. Specifically, the Court has noted that:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.[30]

When Congress so includes an express preemption provision in its legislation, a court must of course construe that statutory language to determine the scope of that preemption.[31] This exercise in statutory construction must be informed both by the ultimate goal of ascertaining Congressional intent and by the presumption against preemption, a presumption

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25. *Medtronic*, 64 U.S.L.W. at 4629 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2618 (1992).
26. L. TRIBE, *supra*, § 6-25 at 481 n.14; *Schneidewind*, 108 S.Ct at 1150.
27. *Id.*; L. TRIBE, *supra*, § 6-25 at 481 n.14.
28. *Schneidewind*, 108 S.Ct. at 1150; L. TRIBE, *supra*, § 6-25 at 481 n.14.
29. *Schneidewind*, 108 S.Ct. at 1150-1151; L. TRIBE, *supra*, § 6-25 at 481 n.14.
30. *Cipollone*, 112 S.Ct. at 2618 (citations omitted); *see also Medtronic*, 64 U.S.L.W. at 4629.
31. *Medtronic*, 64 U.S.L.W. at 4629.

that (as noted above) is particularly powerful when Congress has legislated in an area historically subject to regulation by the state.[32]

In considering the overall scope of preemption implied by the subsections of §§ 251 and 261 quoted above, we must bear in mind that State access and interconnection policies need only be "consistent with" the Act.[33] Those express provisions convey in unambiguous terms the Congressional intent not to broadly preempt state action. Instead, those provisions demonstrate that states have primary jurisdiction over interconnection and access, and are preempted only from imposing requirements that are inconsistent with relevant provisions of the Act and FCC regulations. This conclusion is in keeping with the Supreme Court's command in *Cipollone* that "... we must construe these provisions in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of [the statutory preemption provision]."[34] This is also in keeping with the conclusion that "consistent with" does not require that States implement regulatory policies that are identical to those that will prevail at the Federal level.[35]

Finally, I note that BAVT's reading of the Eighth Circuit's interpretation of § 251(c)(3), taken to its logical extreme, would lead one to conclude that the Act contains an outright prohibition against UNE combination. There is no support for this conclusion, either in the Eighth Circuit Decision or in the Act itself. Nowhere in either is there a suggestion that LECs or CLECs may not voluntarily agree to combine UNEs or that such a practice is unlawful. The Eighth Circuit Decision merely states that the FCC cannot require such a practice.[36] At this time I do not reach the issue of whether it would be appropriate under Vermont law to require BAVT to combine UNEs, but I do conclude that such a decision may be consistent with the

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32. *Id.* at 4629-4630.

33. Since Congress included in the federal statute provisions that explicitly address the preemption of state authority, the scope of preemption is determined by the terms of those express provisions, with this determination measured against the touchstone of Congressional intent and informed by the strong presumption against preemption in this field historically subject to regulation by the states. *Medtronic*, 64 U.S.L.W. at 4629; *Cipollone*, 112 S.Ct. at 2618.

34. *Cipollone*, 112 S.Ct. at 2618.

35. *See Environmental Defense Fund, Inc. v. E.P.A.*, 82 F.3d 451 (D.C. Cir. 1996)("consistent with" does not require exact correspondence, but only congruity or compatibility). Note also that, in the Rehearing Order (at 806-807), the Eighth Circuit reaches the same conclusion.

36. Rehearing Order at 813.

purpose of the Act to promote competition in the market for local exchange service. For all these reasons, I conclude that neither the Act nor the Eighth Circuit's decision precludes the Board from considering whether it is appropriate for BAVT to make available combined network elements for requesting CLECs.

III. ISSUE PRECLUSION

BAVT also argues that AT&T and the DPS are precluded under the doctrine of collateral estoppel (issue preclusion) from raising UNE-platform issues in this docket.[37] Specifically, BAVT argues that "[h]aving litigated and lost the issue of combined network elements before the Eighth Circuit, the doctrine of issue preclusion mandates that the [CLECs] not be permitted to relitigate the same issue before the Board."[38] For the reasons that follow, I conclude that the parties are not barred from raising the question of the Board's authority to consider UNE combination.

Before precluding relitigation of an issue, a court must "examine the first action and the treatment the issue received in it."[39] Also, as proponent, BAVT has the burden of establishing that the prior litigation bars the parties from raising, and therefore the Board from considering, whether the Board has authority over the provisioning of UNE combinations.[40] The Vermont Supreme Court held, in *Trepanier v. Getting Organized, Inc.*, that the application of "issue preclusion" involves a determination of five factors.[41] For the purposes of this analysis, I will focus first upon the third factor set out in *Trepanier* – that is, is the issue the same as the one previously litigated? – before looking at the other elements. Absent a demonstration that there is an identity of issues between the question of Board authority being raised in this docket and the issues raised in the Eighth Circuit case, collateral estoppel cannot bar consideration of the Board's authority.

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37. BAVT 1/23/98 at 15, citing *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) and Rehearing Order.

38. *Id.*

39. *State v. Pollander*, No. 96-387 Slip Op. at 3 (Vt. Supreme Court, Dec. 5, 1997).

40. *Ianelli v. Standish*, 156 Vt. 386, 388 (1991).

41. *Trepanier v. Getting Organized, Inc.*, 155 Vt. at 265 (1990); *State v. Stearns*, 159 Vt. 266, 268, 617 A.2d 140, 141 (1992).

In their arguments on preemption (already discussed), the parties confront the question of whether the issue raised in this docket is the same as that which was taken up in the earlier action. AT&T and the Department contend that the Eighth Circuit ruled on whether the FCC was justified in developing its unbundling regulations. They also argue that the Court never considered the state role in the unbundling process. Finally, they contend that, had that question been considered, the Court's discourse on the point would have been *dicta* only and, as such, inessential to its holding. BAVT, on the other hand, argues that the Eighth Circuit Decision was not jurisdictional but, rather, dispositive on the substance of the issue, when it concluded that mandating UNE combinations is inconsistent with § 251(c)(3) of the Act.

In its Rehearing Order, the Eighth Circuit ruled on two issues that are relevant to the question before the Board now: one, the FCC's authority with respect to unbundling generally and, two, its specific proposal for network element unbundling practices.[42] The Eighth Circuit expressly characterizes its inquiry as the review of a final order issued by the FCC pursuant to federal statute.[43] In the current docket, it is the Board's authority, and not the FCC's, that is at issue.[44] Here the Board must consider whether the Act according to the Eighth Circuit Decision preempts it, acting under state authority, from considering UNE combination. Accordingly, the issue is not the same as that addressed by the Eighth Circuit and collateral estoppel does not apply.[45]

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42. Other state commissions agree with this characterization of the Eighth Circuit's Rehearing Order. See, *e.g., In the matter of the petition of BRE Communications, L.L.C. for arbitration of interconnection terms, conditions, and prices from GTE North Incorporated and Contel of the South, Inc., d/b/a GTE Systems of Michigan*, Michigan Public Service Commission Case No. U-11551, Order of 1/28/98, at 4-6.

43. Rehearing Order at 792.

44. It is common for a federal agency and similar state agencies to concurrently consider related issues, *e.g.*, the current FCC Notice of Proposed Rulemaking on measurement and performance of Operational Support Systems (OSS) and numerous states' proceedings on OSS costs and cost allocations.

45. Absent a showing that the issues are the same, there is little sense in providing an extended discussion of the other *Trepanier* elements. However, to be thorough, I quickly consider each of the remaining elements: (1) *Preclusion must be asserted against one who was a party or in privity with a party in the earlier action*. This case involves many of the same parties as those that participated in the Eighth Circuit case, including AT&T, MCI, Sprint, and Bell Atlantic; however, the Department was not a party. Thus, element one is not met. (2) *The issue was resolved by a final judgment on the merits*. Related to this factor is the precept that preclusion applies only to an issue which was necessary and essential to the resolution of the prior case. See, *e.g., State v. Pollander*, No. 96-387 Slip Op. at 3 (Vt. Supreme court, Dec. 5, 1997); *Berisha v. Hardy*, 144 Vt. 136, 138, 474 A2d. 90, 91 (1984); *Longwiello v. Windham Southwest*

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